No. 80-5116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS, *Petitioner,*

v.

LOU BREWER, WARDEN,
DEPARTMENT OF CORRECTIONS, *Respondent.*

On Writ of Certiorari To The United States Court Of Appeals For the Seventh Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1) Whether it was error to dismiss Petitioner's complaint brought under 42 U.S.C. §1983 for failure to exhaust state administrative remedies.

2) Whether the District Court erred by not granting judgment to the Petitioner.*

3) Whether the District Court erred by dismissing Petitioner's complaint prior to hearing or ruling upon his motion for leave to amend and supplement his original complaint.

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* After review of the record below, it is now Petitioner's position that this question cannot be appropriately decided by this Court since neither the Court of Appeals nor the District Court below addressed the question, no request for judgment was made to the District Court, and the record now contains insufficient information for an adequate determination of the question.

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OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit issued an unpublished order on June 20, 1980, affirming the decision of the United States District Court for the Northern District of Illinois. It is reproduced in the Joint Appendix at 27-28. The United States District Court for the Northern District Of Illinois issued an unpublished Memorandum Opinion and Order on October 24, 1979, dismissing Petitioner's complaint. It is reproduced in the Joint Appendix at 25-26.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was issued on June 20, 1980. The Petition for Writ of Certiorari was filed on July 25, 1980. Certiorari was granted on November 10, 1980. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED*

Section 1983 of Title 42 of the United States Code.

Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980), Section 7.

Illinois Unified Code of Corrections, 3-88; Illinois Rev. Stat. ch. 38, §1003-8-8 (1979).

STATEMENT OF THE CASE

On February 2, 1979, Petitioner Dane Lamar Jenkins was transferred to the Stateville Correctional Center in Illinois. Complaint, at 3 (J.A. 5). On February

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* The pertinent text of the statutes cited is set forth in the Appendix to this Brief.

24, 1979, the Director of the Illinois Department of Corrections declared Stateville Penitentiary in a state of emergency. Lou Brewer, Warden of the Penitentiary, acting pursuant to this declaration, initiated a "lock down" under which all prisoners were temporarily assigned to cells in other houses and all contraband property was to be seized. Motion to Amend Complaint, at 1 (J.A. 21). All property belonging to the prisoners was to be left behind in their original cells. Petition for Certiorari, at 3. A directive from Warden Brewer instructed all prisoners to place non-essential property in shipping boxes to be mailed to their families; all other property was to remain on their beds for inspection. *Id.*

On March 17, 1979, Petitioner was separated from his cell for seven days, *Id.* On his return, Petitioner discovered that all his property was missing. Complaint, at 3 (J.A. 5). Petitioner's property included personal mail, legal correspondence, legal documents and miscellaneous personal property valued at $600.00. Affidavit of Missing Personal Property (J.A. 9-10). No property receipt was issued to the Petitioner in apparent violation of prison regulations. Motion to Amend Complaint, at 2 (J.A. 22).

Petitioner filed a grievance concerning his lost property with the Institutional Inquiry Board, which heard the grievance on April 19, 1979. Stateville Inquiry Board Report (J.A. 11). The Board made the following finding: "The package in question cannot be verified as having left the cellhouse and being in existence. Resident may file in Court of Claims." *Id.* Warden Brewer concurred in this finding. *Id.* Petitioner then filed a second grievance with the Institutional Inquiry Board, to which the Board declined jurisdiction. Petition for Certiorari, at 3-4.

On May 29, 1979, Petitioner filed a complaint in the United States District Court for the Northern District of Illinois under 42 U.S.C. §1983, seeking reimbursement from the persons responsible, including the Warden "for personal property that was taken from me illegally appox. (sic) $600.00 dollars, and for damages suffered as a cause of personal property taken from me illegally (sic) the amount of $10,000 dollars." Complaint, at 4 (J.A. 5).

On August 20, 1979, Petitioner filed a Motion for Leave to Amend and Supplement Plaintiff's Original Complaint, which motion sought to join as defendants the Director of the Illinois Department of Corrections and other prison officials. These officials were alleged to have conspired to deprive him of his property in violation of the due process and equal protection clauses of the United States Constitution. (J.A. 20-23).

On October 24, 1979, the District Court dismissed Petitioner's complaint for failure to exhaust administrative remedies. The District Court opinion did not address Petitioner's Motion for Leave to Amend. Memorandum Opinion and Order, at 2 (J.A. 26). On June 20, 1980, the Court of Appeals for the Seventh Circuit affirmed the dismissal of the complaint also on the ground that Petitioner had failed to exhaust his administrative remedies. Order, at 1 (J.A. 28). On November 10, 1980, this Court granted Petitioner's *pro se* Petition for a Writ of Certiorari. (J.A. 29). On November 17, 1980, counsel was appointed for Petitioner.

SUMMARY OF ARGUMENT

The Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, prohibits federal courts from

requiring prisoners to exhaust administrative remedies before filing suit under 42 U.S.C. §1983, unless it has been determined by the court or the Attorney General that the prison grievance procedure is in substantial compliance with regulations promulgated by the Attorney General. The Act further authorizes a court to continue a prisoner's case for a maximum of ninety days while the prisoner exhausts the prison grievance procedure. Since the District Court decided to dismiss, rather than continue, Petitioner's case and never made the requisite determination of substantial compliance, the decision below must be vacated and the case remanded for further proceedings consistent with the Act. Public L. No. 96-247 applies to Petitioner's case since it was enacted prior to this Court's determination of this appeal.

Even if Pub. L. No. 96-247 were not dispositive of this case reversal of the decisions below is warranted because of reasons of *stare decisis*. This Court has consistently held that exhaustion of administrative remedies is not required in cases under section 1983. Affirmance of the Court of Appeals below would require a direct overruling of these clear and consistent precedents. None of the criteria this Court has previously used to justify direct overruling of precedent apply to this case. Recent expressions of congressional intent support the no-exhaustion rule. The no-exhaustion decisions are not themselves departures from precedents and were decided with clear recognition of the exhaustion issue and its implications. Overruling would frustrate reliance placed on the prior decisions and, finally, the prior decisions correctly construed section 1983.

The language and origins of section 1983 confirm that a requirement of exhaustion of administrative remedies is inconsistent with congressional intent. Such a

requirement would add a jurisdictional limitation to the specific jurisdictional prerequisites that Congress has already established. The application of section 1983 would be thereby rendered highly uncertain since the appropriateness of an exhaustion requirement would become the subject of litigation with respect to each state and local governmental unit in which a section 1983 cause of action would otherwise arise. This Court has consistently refused to read an exhaustion of administrative remedies requirement into the language of the Reconstruction era civil rights laws in the absence of subsequent federal legislation demonstrating Congress's specific intent to require such exhaustion. An exhaustion of administrative remedies requirement would also render section 1983 ineffectual in light of *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790 (1980), in which this Court held that state statutes of limitations applicable to section 1983 suits are not tolled as a matter of federal law during the period in which plaintiffs exhaust state remedies.

An exhaustion of administrative remedies requirement would be inconsistent with congressional intent in enacting section 1983's predecessor in 1871. Contemporaneous statutes and a contemporaneous statutory construction by this Court demonstrate that Congress did not intend that an exhaustion of administrative remedies requirement be read into the language of section 1983. Such a requirement, moreover, would contradict Congress's motivation in enacting section 1983, which was to provide a federal court remedy because state administrative and judicial remedies were deemed generally inadequate to protect citizens' constitution right.

Even if it were not clear that Congress intended to foreclose judicial imposition of an exhaustion of ad-

ministrative remedies requirement under section 1983, such a requirement would be inconsistent with the exhaustion doctrines' own criteria for determining its applicability. Exhaustion of administrative remedies may not be required unless it is clear that such remedies are consistent with the purposes of Congress's statutory scheme and can provide adequate redress for plaintiff's statutory claim. Administrative remedies are not adequate to fulfill section 1983's three purposes of deterring violations of constitutional rights, providing compensation for the victims of such violations, and upholding the significance of constitutional rights in our society. Administrative agencies are inherently incapable of fulfilling the latter purpose because the independent status of the judicial branch of government gives it a unique role in maintaining the supremacy of the Constitution.

However, even if some administrative remedies could provide an adequate remedy for claims arising under section 1983, the Illinois prison grievance procedure does not provide such a remedy. The Illinois procedure does not meet four of the five standards Congress has established in Pub. L. No. 96-247 for grievance procedures that may be subject to an exhaustion requirement in section 1983 suits. The Illinois procedure, moreover, would be inadequate even if Congress had not already established the minimum standards for adequate grievance procedures since it does not provide any redress for constitutional violations, does not provide a damage remedy, and does not provide procedural safeguards that are necessary for meaningful protection of constitutional rights.

Regardless of the inadequacy of the Illinois grievance procedure in general, exhaustion would have been futile in petitioner's case. The Institutional Inquiry

Board itself recognized this in recommending that Petitioner file in the Illinois Court of Claims rather than pursue the administrative appeal, which was deemed necessary by the District Court below. The Illinois Court Of Claims, however, affords no remedy for claims arising under either section 1983 or the Fourteenth Amendment.

Finally, the District Court's dismissal of Petitioner's case without addressing his Motion For Leave To Amend the Complaint was error both because the record reveals no cause for denial of the Motion and because the Amended Complaint provided further reason why an exhaustion requirement is inappropriate. The Amended Complaint alleged that the Director of Corrections and other prison officials conspired to deprive Petitioner of his property in violation of the fourteenth amendment. Since the grievance procedure is directly controlled by the administrators who Petitioner claims conspired to violate his constitutional rights, that procedure is not impartial and is, therefore, an inadequate remedy for petitioner's constitutional claims.

ARGUMENT

I. Congress's Recent Enactment Of Section 7 Of Pub. L. No. 96-247 Requires That The Court Of Appeals Judgment Affirming The Dismissal Of Petitioner's Complaint For Failure To Exhaust Prison Grievance Procedures Be Vacated.

Regardless of the practical advantages courts may perceive in requiring exhaustion of administrative remedies, courts cannot impose such a requirement in the face of contrary congressional intent. *See Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). In the Civil Rights of Institutionalized Persons Act of

1980, Pub. L. No. 96-247, 94 Stat. 349 (1980) (hereinafter cited as Pub. L. No. 96-247),[1] Congress prohibited courts from requiring prisoners to exhaust administrative remedies in section 1983[2] suits, except in accordance with the limitations prescribed in section 7 of the Act. The exhaustion requirement imposed below violated those express limitations.

Section 7(a)(1) of Pub. L. No. 96-247 provides that in any prisoner section 1983 action the court shall, if it believes it appropriate and in the interest of justice, continue the case for up to ninety days in order to require exhaustion of available plain, speedy, and effective administrative remedies. Section 7(a)(2) states that such exhaustion "may not be required unless the Attorney General has ceritified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." Subsection (b) requires the Attorney General to promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of prisoner grievances.[3]

Public L. No. 96-247 clearly applies to the instant case since its enactment precedes final ruling by this Court. *See Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Bradley* v. *School Board of Richmond*, 416 U.S. 696, 711-12 (1974); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-82 (1969). The District Court below

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[1] The relevant text is set forth *infra*, at 1a.

[2] 42 U.S.C. 1983 (1976). The text is set forth *infra*, at 1a.

[3] The Attorney General's proposed regulations pursuant to §7(b)(1) are published in 45 Fed. Reg. 79,095-101 (1980) (to be codified in 28 C.F.R. Part 40). Section (b)(2) specifies five specific criteria that must be set forth in these standards.

could not have made the requisite determination of substantial compliance with the Regulations since neither the Act nor the Regulations existed when the court dismissed plaintiff's case for failure to exhaust.[4] Congress's present directive to the court, however, is clear and unavoidable: exhaustion of administrative remedies in a prisoner section 1983 suit may not be required unless the prescribed judicial determination is made.

The District Court's dismissal of plaintiff's complaint for failure to exhaust also requires reversal since section 7(a)(1) authorizes the court to do no more than continue the prisoner's case for ninety days while the prisoner exhausts the available remedies. Although section 7(a)(1) does not specifically prohibit dismissal for failure to exhaust, the fact that it authorizes only a continuance for such failure demonstrates Congress's intent that dismissal not be an allowable sanction for failure to exhaust. This is in accordance with the "frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . [This] principle reflects an ancient maxim — *expressio unius est exclusio alterius.*" *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974); *see also TVA* v. *Hill*, 437 U.S. 153, 188, (1978).

In sum, affirmance of the Seventh Circuit's decision approving the dismissal of Petitioner's complaint for failure to exhaust administrative remedies would sanction exactly what Congress prohibited when it denied federal

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[4] The date of enactment of Pub. L. No. 96-247, May 23, 1980, preceded the June 20, 1980, ruling below by the Seventh Circuit, but was subsequent to the October 24, 1979 ruling by the District Court below.

courts the authority to require exhaustion except in the manner specified in Pub. L. No. 96-247. The Seventh Circuit's decision should therefore be vacated with directions to remand the case to the District Court for further proceedings consistent with the requirements of Pub. L. No. 96-247.

II. The Principle Of *Stare Decisis* Warrants Reversal Of The Seventh Circuit's Decision Affirming The Dismissal Of Petitioner's Complaint.[5]

A. THE DISMISSAL BELOW DIRECTLY CONTRADICTS CONSISTENT SUPREME COURT HOLDINGS.

This Court has consistently and unequivocally held that exhaustion of administrative remedies is not required under section 1983.[6] These holdings have often been affirmed by this Court's dicta as well.[7] The Court

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[5] It is Petitioner's position that this Court need reach the issues discussed in sections II through IV of this Brief only if it does not find the argument in section I dispositive of the case.

[6] *Carter* v. *Stanton*, 405 U.S. 669 (1972) (per curiam); *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Houghton* v. *Shafer*, 392 U.S. 639 (1968) (per curiam); *Damico* v. *California*, 389 U.S. 416 (1967) (per curiam); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

[7] *Ellis* v. *Dyson*, 421 U.S. 426, 432-33 (1975) ("Exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, for we have long held that an action under §1983 is free of that requirement."); *Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) - as they are here - we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."). *See also Wolff* v. *McDonnell*, 418 U.S. 539, 554-55 (1974); *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974); *Preiser* v. *Rodriguez*, 411 U.S. 475, 492-93 n.10, 494 (1973) ("Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies."); *United States ex rel. Ricketts* v. *Lightcap*, 567 F.2d 1226, 1229-33 (3d Cir. 1977).

of Appeals for the Seventh Circuit, however, in *Secret* v. *Brierton*, 548 F.2d 823, 826-27 (7th Cir. 1978), the decision upon which it relies below, maintained that this Court's holdings are limited to the proposition that under section 1983 plaintiffs are not required to exhaust futile remedies. The Seventh Circuit reasoned that the remedies actually at issue in the Court's exhaustion cases were in fact futile and that any broader statement by the Court was therefore merely dictum. *Id.* The language actually used by the Court in these cases, however, demonstrates the exact opposite: the Court rested its decisions on the holding that exhaustion was not required under section 1983; its references to the probable futility of exhaustion were simply observations unnecessary to the decisions.

First, in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), the Court reversed the dismissal of a section 1983 action for failure to exhaust state administrative remedies. *Id.* at 674. The Court premised this result on the fact that in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), it had "previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Id.* at 671. Later in the opinion, the Court introduced its discussion of the probable inadequacy of the state administrative remedy by stating: "[m]oreover, it is by no means clear that Illinois law provides petitioner with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." *Id.* at 674-75. The Court's use of the term "moreover", which is synonymous with "in addition to" or "besides," demonstrates that the discussion of the probable futility of exhaustion was intended only to supplement, and not supplant, the Court's preceding dispositive determination of the lack of any

need to exhaust administrative remedies under section 1983.

Any doubt as to the Court's intent in this regard, however, was removed by the Court's decisions in *Houghton* v. *Shafer*, 392 U.S. 639 (1968) (per curiam) and *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (per curiam). In *Houghton*, the Court initially observed that "it seems likely that to require petitioner to appeal . . . [to further administrative levels] would be to demand a futile act." *Id.* at 640. The Court then concluded that "[i]n any event, resort to these remedies is unnecessary in light of our decisions in *Monroe* v. *Pape*, 365 U.S. 167, 180-183; *McNeese* v. *Board of Education*, 373 U.S. 668, 671; and *Damico* v. *California*, 389 U.S. 416." *Id.* at 640. If the Court had not intended its reliance on the *Monroe — McNeese — Damico* general no exhaustion rule to be the dispositive holding of the case, it would not have used the term "in any event" in order to show that exhaustion is unnecessary regardless of the adequacy of the available remedies. Finally, the Court in *Wilwording* v. *Swenson, supra*, confirmed conclusively that the discussion of futility in *Houghton* was merely dicta and that the Court's holding was that exhaustion of administrative remedies is not required under section 1983; "[a]lthough the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' " *Id.* at 252.

The Seventh Circuit's attempt in *Secret*, 584 F.2d at 827, to dismiss the significance of *Damico* v. *California*, 389 U.S. 416 (1967), on the ground that the administrative remedy in *Damico* would likely have been futile, is also unpersuasive. There is nothing whatever in the Court's opinion in *Damico* to indicate that it even considered futility as an additional reason for not requir-

ing exhaustion of administrative remedies. Similarly, *Secret's* attempt to dismiss the significance of *Wilwording's* general no-exhaustion rule as being limited to exhaustion of judicial remedies must also fail since *Wilwording* both is not so limited and refers specifically to exhaustion of administrative remedies when it relies on *Houghton*. *Wilwording*, 404 U.S. at 252. Finally, the Seventh Circuit's attempt to qualify the Supreme Court's rule that exhaustion of administrative remedies is not required under section 1983 is undermined even further by the fact that it cannot, and does not attempt to, dismiss the relevance of *Carter* v. *Stanton*, 405 U.S. 669 (1972), and *Metcalf* v. *Swank*, 406 U.S. 914 (1972), in which cases the Court applied without qualification the no-administrative-exhaustion rule in the context of section 1983 challenges to welfare regulations.[8]

Thus, in light of the Court's holdings in *McNeese*, *Damico*, *Houghton*, and *Wilwording* and the Court's

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[8] The Seventh Circuit in *Secret* attempts to find in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), support for its departure from the holdings of *McNeese, Damico, Houghton*, and *Wilwording*. *Secret*, 548 F.2d at 828. However, the Court in *Gibson* both cites as valid authority its no-administrative-exhaustion holdings in *McNeese* and *Damico* and raises the possibility of an alternative holding only "where the individual charged is to be deprived of nothing until the completion of that proceeding. . . ." *Gibson* v. *Berryhill*, 411 U.S. at 574-75. Thus, the possible exception to which *Gibson* alludes fits within well-established principles of ripeness and has no application where, as in the instant case, compensation for a past deprivation of constitutional rights is sought. *See McCray* v. *Burrell*, 516 F.2d 357, 364 (4th Cir. 1975), *cert. dismissed as improvidently granted*, 426 U.S. 471 1976). Moreover any implication of a broader exception to the exhaustion doctrine as a result of *Gibson* fails in light of the Court's subsequent reaffirmance of its general rule barring an administrative exhaustion requirement under section 1983 in *Ellis* v. *Dyson*, 421 U.S. 426, 432-33 (1975), *Wolff* v. *McDonnell*, 418 U.S. 539, 554-555 (1974), and *Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974).

repeated characterization of its holdings in those cases, *supra* note 7, at 10, the Seventh Circuit's contention that the Court has not clearly and unequivocally held that exhaustion of administrative remedies is not required under section 1983, is untenable[9] An affirmance of the Court's holding below, requiring Petitioner to exhaust administrative remedies under section 1983, would thus require a direct overruling of the Court's contrary holding. For the reasons stated in Parts II B and III, *infra,* at 14-33, such an overruling would be unwarranted under all of the factors the Court has previously used in determining whether the values underlying the principle of *stare decisis* are outweighed by the need to reject prior controlling authority.

B. THIS CASE PRESENTS NO JUSTIFICATION FOR DEPARTING FROM THE PRINCIPLE OF *STARE DECISIS.*

Citing the principle of *stare decisis*, the Court has expressed reluctance to overrule its prior holdings simply because different rulings might currently seem more appealing. *See Runyon* v. *McCrary*, 427 U.S. 160, 174-75 & n.12 (1976). *See also Monell* v. *Department of Social Services of New York*, 436 U.S. 658, 714-19 (1978) (Rehnquist, J., dissenting). This reluctance is particularly

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[9] Even if the Court's discussion in these cases of the futility of exhaustion were to be deemed holdings rather than dicta, the Seventh Circuit would be incorrect in disregarding as dicta the Court's conclusions that exhaustion is not required under section 1983. Such conclusions are, at the least, independent grounds of the decisions and as such cannot be deemed dicta simply because a reader prefers the alternative grounds. *See United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) ("for where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' "). *See also Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

strong is cases involving statutory analysis because of Congress's ability to correct through legislation what it might find to be judicial misinterpretation of its true intent. *See Edelman* v. *Jordan*, 415 U.S. 651, 671 & n.14 (1974); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736-37 (1977). The burden that must be met to justify overruling prior holdings construing civil rights legislation was recently analyzed fully in *Monell* v. *Department of Social Services of New York*, 436 U.S. at 695-701. The Court and the separate opinion writers set forth five factors that may be used to justify such overruling.[10] None of these factors now justify overruling the Court's above discussed repeated holdings that exhaustion of administrative remedies is unnecessary under section 1983.

First, recent expressions of congressional intent demonstrate Congress's knowledge of and agreement with the Court's prior holdings rejecting an administrative exhaustion requirement under section 1983. Even if the enactment of Pub. L. No. 96-247 were not in itself dispositive of this case, *see* Part I *supra*, the legislative history of the limited exhaustion requirement of that Act demonstrats conclusively that Congress knew of and agreed with the Court's rejection of an administrative exhaustion requirement for section 1983

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[10] These factors are: first, whether overruling would contradict congressional intent, 436 U.S. at 696-99; second, whether the prior holdings in question were themselves a departure from prior holdings, *id.* at 695-96; third, whether overruling would frustrate a party's legitimate reliance placed on the prior holdings, *id.* at 699-700; fourth, whether the issues in question were fully argued in and addressed by the prior cases, *id* at 709 (Powell, J., concurring); and fifth, whether the prior holdings had misconstrued the statute's meaning, *id.* at 700-01. With respect to the last factor, the Court did not decide whether the prior holdings had to appear wrong "beyond doubt," as advocated in Justice Rehnquist's dissent, *id.* at 715, but found such test to have been satisfied in any event. *Id.* at 700-01.

cases, except under the particular conditions specified in the Act.[11] Such explicit congressional acquiescence in prior holdings is a powerful reason to accord such holdings *stare decisis* effect. *See Runyon* v. *McCrary*, 427 U.S. 160, 173-75 (1976). Moreover, the simple fact of congressional inaction during the seventeen years since the Court first specified in *McNeese* its no administrative exhaustion rule is additional reason not to overrule the

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[11] *See* 124 Cong. Rec. H 7481 (daily ed. July 28, 1978) (remarks of Rep. Wiggins with regard to H.R. 9400, a predecessor to Pub. L. No. 96-247). Rep. Wiggins stated:

> Mr. Chairman, it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action. For many years, some of us have felt that the requirement of exhaustion of remedies would be a desirable in the case of 1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement.

Id. Rep. Ertel further stated:

> At the present time under 1983 a State prisoner can come directly into Federal court, file his petition with no notification to the State whatsoever, and the Federal Court must take jurisdiction of that action under 1983.

Id. at H 4624.

See also Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 1st and 2d Sess. 20 (1977-78) (Testimony of Hon. Drew S. Days III, Asst. Attn. Gen., Civil Rights Division, U.S. Department of Justice.):

> We have given some thought to that issue, needless to say. And I think it is important to understand something about the background of exhaustion requirements insofar as section 1983 of 42 U.S. Code is concerned.
>
> The Supreme Court has repeatedly declined to require that a plaintiff in a section 1983 action exhaust State remedies, either judicial or administrative. The basis for that position taken by the Supreme Court is articulated in a case called the *McNeese* case. . . .

Id.

Court's holdings in this regard. *See Flood* v. *Kuhn*, 407 U.S. 258, 269-85 (1972).

Second, unlike the situation in *Monell*, 436 U.S. at 695-96, overruling is here unwarranted because the prior holdings now at issue were not departures from prior practice. Before *Monroe* and *McNeese* the Court had never addressed the question of whether exhaustion of state administrative remedies was required under section 1983.

Third, the Court's no-exhaustion holdings constitute a clear and uncontradicted line of precedent that was decided with an obvious recognition of their implications, as is demonstrated both by Justice Harlan's dissent in *Damico* v. *California*, 389 U.S. at 417-20, and by the briefs filed in that case. Where there are such explicit, consistent, and fully discussed holdings on a question of statutory construction, principles of *stare decisis* apply most strongly. *See also Maine* v. *Thiboutot*, 100 S.Ct. 2502, 2517-19 (1980) (Powell, J., dissenting); *Monell*, 436 U.S. at 708-09 (Powell, J., concurring).

Fourth, to overrule the Court's holdings rejecting an administrative exhaustion requirement would frustrate the reliance placed on such holdings by plaintiffs, such as the Petitioner, who are likely to have foregone the available state administrative remedies because of the direct federal court remedy which the Supreme Court has consistently held open to them.[12] *See Monell*, 436 U.S. at 699-700.

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[12] This consideration would also warrant that should this Court reject all of Petitioner's arguments and find an exhaustion of administrative remedies requirement under section 1983, such requirement be imposed prospectively. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971).

Finally, *stare decisis* effect should be accorded the Court's prior decisions rejecting an exhaustion of administrative remedies requirement under section 1983 because it is "not beyond doubt" that such decisions misconstrued the meaning of section 1983. *See supra* note 10, at 15. Indeed, as discussed in Part III, *infra*, such decisions are clearly correct in their construction of the statute.

III. Requiring Plaintiffs To Exhaust Administrative Remedies Before Filing Suit Under Section 1983 Would Frustrate Congress's Intent In Creating And Maintaining An Independent Federal Remedy For The Vindication Of Constitutional Rights.

The Court has consistently emphasized that the Reconstruction civil rights statutes must be given the meaning dictated by their "origins and their language." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Maine* v. *Thiboutot*, 100 S.Ct. at 2509 (Powell, J., dissenting); *see also Owen* v. *City of Independence*, 445 U.S. 622, 635-37 (1980). The historical context in which section 1983 was enacted confirms what the expansive sweep of the statutory language clearly commands: courts cannot interject a requirement of exhaustion of state remedies to delay or deny the independent right of action in federal court that Congress gave plaintiffs under section 1983.[13]

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[13] Since for present purposes there are no determinative differences in the language of the present 42 U.S.C. §1983 and of its predecessor, Section 1 of the Civil Rights Act of 1871, reference to section 1983 herein includes reference to the provisions of the original Act.

A. AN EXHAUSTION OF STATE REMEDIES REQUIREMENT WOULD CONTRADICT THE LANGUAGE OF SECTION 1983.

It is not necessary to look beyond the words of section 1983, *infra*, at 1a, to reject an exhaustion of administrative remedies requirement since the plain language of the statute, supported by consistent judicial interpretation, makes such a requirement impermissible. *See Maine* v. *Thiboutot*, 100 S.Ct. at 2505 n.4. Requiring a plaintiff to exhaust administrative remedies before being able to file suit under section 1983 would legislate a condition for seeking relief that is inconsistent with the terms of the Act:

> By the plain terms of §1983, two — *and only two* — allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. *See Monroe* v. *Pape*, 365 U.S. 167, 171 (1961).

Gomez v. *Toledo*, 100 S.Ct. 1920, 1923 (1980) (emphasis added). Had Congress intended an exhaustion requirement as an additional condition for seeking relief under section 1983, it could have easily so specified, as Congress has frequently done in regard to other civil rights legislation.[14] Indeed, when Congress did wish a limited

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[14] *See, e.g.*, Title VII of the Civil Rights Act of 1964, (42 U.S.C. §2000 *et seq.* (1976 & Supp. 1979); The Federal Habeas Corpus Statute, 28 U.S.C. §2254 (1976); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) (In *Preiser* the Court justified its prior cases refusing to require exhaustion of administrative remedies under section 1983 on the ground that "in those cases brought pursuant to §1983, no other, more specific federal statute was involved that might have reflected a different congressional intent." *Id.* at 492 n.10.); *see also Allen* v. *McCurry*, 49 U.S.L.W. 4015, 4019 n.24 (Dec. 9, 1980) ("Under the modern statute, federal habeas corpus is bounded by a

exhaustion requirement under section 1983, it expressed such intent explicitly in Pub. L. No. 96-247. *See* Part I *supra*.

Petitioner does not contend, however, that the adequacy of state remedies may never limit the relief to which plaintiffs are entitled in suits brought under section 1983. Under certain circumstances a plaintiff might be required to allege the inadequacy of state remedies as an element of his claim of a deprivation of due process of law. *See, e.g., Ingraham* v. *Wright*, 430 U.S. 651, 670-79 (1977). *See also Bonner* v. *Coughlin*, 517 F.2d 1311, 1319-20 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). Unlike the due process clause, however, the language of section 1983 is not so vague that it might warrant importation of a requirement of showing inadequate state remedies in order to provide substantive content to its terms. To the contrary, reading such a requirement into the language of section 1983 would convert its clear and specific jurisdictional prerequisites, *see Gomez* v. *Toledo*, *supra*, at 19-20, into a statute the coverage of which would be indeterminant on its face. Only through individualized adjudication of the adequacy of the administrative remedies actually available in each case could it then be determined whether any plaintiff has a direct right of action under section 1983. It may be that exhaustion of certain administrative remedies is required under section 1983 where the alleged violation is also the subject of a comprehensive enforcement scheme under a separate federal statute. *See Chapman* v. *Houston*

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requirement of exhaustion of state remedies and by special procedural rules . . . which have no counterparts in §1983, and which therefore demonstrate the continuing illogic of treating federal habeas and §1983 suits as fungible remedies for constitutional violations.").

Welfare Rights Organization, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting). However, an exhaustion requirement that would depend upon a determination of the adequacy of the administrative remedies in each of the countless governmental units in which section 1983 suits might be brought would have no justification in the language of any federal statute[15] and would leave courts and litigants guessing in each case whether section 1983 affords a direct right of action.

The uncertainty and added litigation burden that would result from importing an exhaustion of administrative remedies requirement into the language of section 1983 would probably not be offset by the possible reduction in the number of section 1983 suits resulting from such a requirement.[16] However, even if

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[15] As noted *supra*, at 10, this argument applies only if Pub. L. No. 96-247 is not deemed dispositive of this case. The exhaustion requirement in Pub. L. No. 96-247 demonstrates, however, the manner in which Congress can narrowly define the limitations on a requirement of exhaustion of state administrative remedies so that its application is precisely ascertainable and the protection afforded by the statute is not eviscerated by state statutes of limitations. *See* discussion of *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790 (1980), *infra*, at 23-24.

[16] Furthermore, the burden on federal courts from such suits may not be as severe as is sometimes asserted. According to one recent study of the question:

> The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate. The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get under way, because prisoner cases are not particularly complex as compared to other types of federal litigation.

Turner, *When Prisoners Sue: A Study Of Prisoner Section 1983 Suits In The Federal Courts*, 92 Harv. L. Rev. 610, 637 (1979). Moreover, as this study also points out, an exhaustion requirement might even increase the number of suits: "Indeed, it is possible that

efficiency and convenience would be promoted by such a requirement, courts may not on these grounds disregard the prerequisites Congress has, and has not, stipulated for stating a cause of action in federal court. In diversity actions the Court has rigorously applied the principle that Congress's choice of forum must be respected regardless of courts' desire to promote efficiency and convenience by shifting cases to state forums. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976). This principle is even more central to the implementation of congressional intent under the broadly remedial Reconstruction era civil rights laws. As the Court pointed out in *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967): "[i]n thus expanding federal judicial power [by enacting the five civil rights acts between 1866 and 1875], Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."

In recognition of Congress's intent to give plaintiffs a full and independent remedy under these Reconstruction era civil rights laws the Court in a recent series of cases has refused to attach an exhaustion requirement to such laws in the absence of a clear manifestation of contrary congressional intent. In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), the Court explicitly recognized the practical advantages that would follow from requiring exhaustion of the requisite administrative procedures under Title VII before allowing plaintiffs to file suit under 42 U.S.C. §1981. This Court, however, rejected an exhaustion requirement because it

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the introduction of a grievance mechanism could increase the number of suits by educating prisoners to make formal complaints, guiding them to articulate inchoate grievances and insist on their adjudication." *Id.* at 634-35 (footnote omitted).

found that Congress had provided independent avenues of relief under the two acts. The practical disadvantages from allowing the filing of a section 1981 action without exhaustion of Title VII administrative machinery, this Court found "are the natural effects of the choice Congress had made available to the claimant by its confering upon him independent administrative and judicial remedies." 421 U.S. at 461. The Court also pointed out that in granting claimants a choice of forum, Congress has given them a valuable right since "under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true." *Id. See also Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974).[17]

Applying the *Johnson* rationale to the relationship between section 1983 and a state remedial scheme, the Court in *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790, 1795-96 (1980), held that the statute of limitations applicable to section 1983 actions in New York cannot be

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[17] Congress has recently granted complainants a similar choice between administrative and judicial remedies in creating an administrative procedure to process complaints concerning Title I of the Elementary and Secondary Education Act. Education Amendments of 1978, 20 U.S.C. §2738 (Supp. 1979). The Senate Report is emphatic that this complaint resolution procedure is not to be deemed a limitation upon complainants' direct right of access to federal court, presumably through section 1983:

> However, the committee wishes to emphasize that these amendments prescribing a complaint resolution process at all three levels should not be construed to prohibit a beneficiary of title I or his representative from bringing a private suit in District Court without first exhausting such administrative procedures. It is particularly important that immediate access to the courts be available where beneficiaries allege that a State or federal policy is inconsistent with title I or that the alleged violations are systemic.

S. Rep. No. 856, 95th Cong., 2d. Sess. 31 (1978).

tolled by reading an exhaustion of state remedies requirement into section 1983:

> The District Court's conclusion that state remedies should be utilized before resort to the federal courts may be an entirely sound and sensible observation, but in our opinion it does not square with what must be presumed to be congressional intent in creating an independent federal remedy.

Id. at 1798. Given *Tomanio's* holding that Congress did not intend to hold open a cause of action under section 1983 while plaintiffs attempt to exhaust state remedies, to require plaintiffs now to exhaust such remedies before suing under section 1983 would render that statute an empty shell, something this Court has heretofore repeatedly refused to do.

B. AN EXHAUSTION OF STATE REMEDIES REQUIREMENT WOULD CONTRADICT CONGRESS'S INTENT IN ENACTING SECTION 1983.

The Court has been willing to read certain limitations into the expansive language of section 1983 where such limitations, such as judicial immunity from damages, were so firmly rooted in the common law as of 1871 and were so firmly supported by policy reasons that Congress would have expressly negated such limitations had it wished them not to be read into section 1983. *See Owen* v. *City of Independence*, 445 U.S. at 637. An exhaustion of state administrative remedies requirement, however, cannot similarly be read into the language of section 1983. Both the common law in 1871 and the policies motivating congressional enactment of section 1983 establish that Congress has never intended exhaustion of administrative remedies to be a prerequisite for filing a federal court action under section 1983.

Not only was the exhaustion of administrative remedies doctrine a development of a later period,[18] but this Court, several months after the enactment of section 1983, specifically rejected an argument for reading such a requirement into a statute that was similar in format to section 1983.[19] In *Clyde* v. *United States*, 80 U.S. (13 Wall.) 38 (1871), the Court of Claims had dismissed a petition for compensation on the ground that the claimant had not followed the Court of Claim's rule of practice requiring claimants to show that they had first unsuccessfully sought relief from the executive department which might have entertained their claims. This Court reversed the dismissal, holding that the Court of Claim's rule was a restriction on that Court's jurisdiction that was not required by the Act creating the Court of Claims. The Act required that the Court of Claims "shall 'hear and determine all claims found upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." *Id.* at 39. "However useful and proper" the Court of Claim's rule was, this Court held that "it was not competent for the Court of Claims to impose it as a condition of presenting a claim in that court," and that such a rule "was established a jurisdictional requirement which Congress alone had power to establish." *Id.*

In addition, if Congress in 1871 had wanted the federal courts to give any consideration at all to prior administrative determinations relevant to plaintiffs'

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[18] *See* Burger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 981 (1939) ("The earliest manifestation of the exhaustion doctrine is found in *Dundee Mortgage Trust Inv. Co.* v. *Charlton*, 32 Fed. 192 (C.C.D. Ore. 1887).")

[19] 15 Stat. 76 (1868).

claims under section 1983, it could have so specified, as it had done three years previously in regard to actions in the Court of Claims. As the Court in *Clyde* noted, Congress had provided in 1868 that an executive department that had decided a claim against it must furnish to the Attorney General "such facts, circumstances and evidence as it might be in possession of in relation to any claim prosecuted in the court of claims. . . ." *Clyde*, 80 U.S. at 39 (referring to An Act to provide for Appeals from the Court of Claims, and for other Purposes, 15 Stat. 76 (1868)). Similarly, if Congress had intended that a federal right of action under section 1983 be limited to those persons who had failed to obtain redress from state administrative remedies, it could have adopted a provision similar in format to that enacted in 1866 which limited the provision of a federal forum to "persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality" rights secured by section 1 of the 1866 Act.[20]

An exhaustion of administrative remedies requirement was in 1871 contrary not only to contemporaneous principles of statutory construction, but also to Congress's motivation in enacting section 1983. As this Court established in *Monroe* v. *Pape*, 365 U.S. at 173-74 (1961), Congress intended through section 1983 to provide a federal remedy because of state laws that were unconstitutional and because of state remedies that were inadequate either in theory or in practice. One of the central questions in *Monroe* was whether section 1983's "under color of" state law requirement made it necessary to establish that the available state law remedies in fact sanctioned the otherwise unauthorized unconstitutional conduct of state officials, as this Court

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[20] Act of April 9, 1866, ch. 31 section 3, 14 Stat. 27.

had previously indicated in the *Civil Rights Cases*, 109 U.S. 3, 17 (1883). *Monroe*, 365 U.S. at 172. In holding that no such showing was necessary to establish action "under color of" state law, the Court did not distinguish between administrative and judicial remedies, but stated only that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

This Court's subsequent refusal to require exhaustion of state administrative, as well as judicial, remedies under section 1983[21] follows logically from the Court's holding in *Monroe* that section 1983's "under color of" state law requirement mandates no more than a showing of an official's unauthorized misuse of state-conferred authority, and not a showing of the approval of such misuse of authority by the processes of state law. If Congress had thus intended the "under color of" law requirement to be satisfied by unauthorized official conduct where state judicial remedies are not exhausted, it would have been the most bizarre statutory draftsmanship if Congress had intended that state administrative remedies must be exhausted in order to meet that same "under color of" law requirement. Moreover, any distinction between judicial and administrative remedies for purposes of satisfying the "under color of" law requirement cannot be presumed from the historical context of section 1983's enactment. Congress in 1871 clearly did not deem state administrative processes an appropriate means to accomplish the Act's central purpose — "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States. . . ." 17 Stat. 13 (1871) (discussed in *Monroe*, 365 U.S. at 171). Rather, Congress, then as now, considered courts the ap-

[21] *See* cases cited Part II A, *supra*, at 10, n.6.

propriate forum for the vindication of constitutional rights. *See infra* note 23, at 29 and accompanying discussion.

Finally and perhaps most importantly, a requirement of exhaustion of state administrative remedies under section 1983 cannot be reconciled with Congress's overriding purpose in enacting section 1983, which the Court has defined as "offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972). (footnote omitted). Congress's intent to provide a federal remedy that superseded the remedies offered by state law was not unprecedented in 1871. This Court in 1842 had confirmed Congress's authority to provide a federal remedy to insure slaveholders' rights to the unhindered possession of their slaves in whatever states their slaves might be found. *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The Court in *Prigg* was explicit that the federal remedy superseded whatever remedies might be provided under state law. *Id.* at 623-25. Relying in part on the authority of *Prigg*,[22] Congress in a similar fashion through the Reconstruction era civil rights laws clearly established "the role of the Federal Government as a guarantor of basic civil rights against state power . . . ," *Mitchum*, 407 U.S. at 239, and transformed the federal courts into " 'the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Zwickler* v. *Koota*, 389 U.S. 241, 247 (1967) (quoting Frankfurter & Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System*

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[22] *See Monell* v. *Department of Social Services of New York*, 436 U.S. at 677.

65).[23] It would thus be incongruous, to say the least, to interpose an exhaustion of state administrative remedies requirement as a prerequisite for federal relief when it was Congress's belief in the total inadequacy of state remedies that motivated Congress's creation of the federal remedy in the first place.

In sum, an exhaustion of administrative remedies requirement can be reconciled with neither the language of section 1983, with the common law background in 1871, nor with the goals of the Congress that enacted the legislation.

C. THE CRITERIA FOR THE JUDICIAL IMPOSITION OF AN EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT CANNOT BE RECONCILED WITH THE PURPOSES OF SECTION 1983.

Petitioner has argued in Part III A and B, *supra*, that the language and origins of section 1983 make clear that Congress intended the federal remedy to be "separate and independent" of state administrative remedies and therefore did not intend that suits under section 1983 be denied or delayed by the requirement of

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[23] *See also* Cong. Globe, 42d Cong., 1st Sess. 653 (1871) (remarks of Rep. Osborn, ("The question now is, what is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts."). Representative Coburn stated:

> Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard.

Id. at 459.

exhausting such remedies. *See Board of Regents* v. *Tomanio,* 100 S. Ct. 1790, 1798 (1980), and accompanying text, *supra,* at 23-24. However, even if this Court concludes that Congress did not positively foreclose the courts from imposing an exhaustion of administrative remedies requirement on suits brought under section 1983, it would still be inappropriate for courts to impose such a requirement since the criteria for judicial application of the exhaustion doctrine are inconsistent with the statutory scheme Congress created in section 1983 for the protection of constitutional rights.

The criteria for judicially imposing an exhaustion of administrative remedies requirement on a federal statutory scheme are not subject to precise formulation. The general rule is that exhaustion is required "[w]here Congress has clearly commanded that administrative judgment be taken initially or exclusively. . . ." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767 (1947), or "where a claim is congnizable in the first instance by an administrative agency alone. . . ." *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956). This Court has also observed that exhaustion is not necessarily "inappropriate when fashioned by judicial decision rather than specific congressional command." *McGee* v. *United States,* 402 U.S. 479, 484 n.6 (1971).[24]

This Court's decisions leave no doubt, however, that an exhaustion requirement must advance the general

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[24] *But see McKart* v. *United States*, 395 U.S. 185, 206-07 (1969) (White, J., concurring.) ("Undoubtedly Congress could require such exhaustion as a prerequisite to judicial review . . . , but Congress has not chosen to do so. In the absence of any such requirement I do not think review of petitioner's classification is an impermissible encroachment upon the bailiwick of the Selective Service System.") (footnote and citation omitted).

purposes of the statutory scheme Congress has designed. *See McGee* v. *United States,* 402 U.S. 479, 484 n.6 (1971) ("The whole rationale of the exhaustion doctrine in the present context lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed.") Where administrative procedures are not clearly adequate to provide the claimant with the relief Congress intended to make available under the statute, the courts will not impose an exhaustion requirement. *See Gibson* v. *Berryhill,* 411 U.S. 564, 575 n.14 (1973); *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196, 210 (1945); Jaffee, *Judicial Control of Administrative Action,* 426, 432 (1965) ("The exhaustion rule comes into effect only if the remedy — whether administrative or judicial does not matter — is adequate to protect the asserted claim. . . . [I]mmediate relief should be given if the court is unable to give firm assurance of adequate relief once the administrative process is complete.")

This Court has described the relief section 1983 affords as incorporating three essential elements. The first two are the "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson* v. *Wegmann,* 436 U.S. 584, 590-91 (1978). *See also Owen* v. *City of Independence,* 445 U.S. at 651. ("Moreover, §1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Id.*). The third component of section 1983 relief is that of preserving the significance that constitutional rights have in our society. *See, e.g., Carey* v. *Piphus,* 435 U.S. 247, 266 (1978) ("By making the deprivation of such rights ["certain 'absolute' rights that

have not caused actual injury"] actionable for nominal damages without proof of actual injury, the law recognizes the importance of organized society that those rights be scrupulously observed. . . .").

No state administrative procedure that we have found purports to offer anything approaching the scope of protection for constitutional rights that Congress intended to make available through the federal courts under section 1983. As this Court has recently pointed out in *Carlson* v. *Green*, 100 S.Ct. 1468, 1473-74 (1980), elements of an effective deterrent and compensatory remedy for constitutional violations include a damage remedy directly against public officials, a punitive damage remedy, and a jury trial. Since these protections are generally considered uniquely characteristic of the judicial remedy in our legal system, it is not surprising that they are invariably absent from state and local administrative remedial schemes.

It is, of course, conceivable that administrative procedures might be designed to offer these safeguards as well as others that are afforded by the federal courts under section 1983. Even if such administrative remedies could then provide compensatory and deterrant relief for constitutional violations comparable to that afforded by federal courts, an exhaustion requirement would nevertheless be unwarranted since such administrative remedies would still be incapable of accomplishing the third goal of section 1983 — providing societal recognition of the importance of observing constitutional rights. Fulfilling this goal may be the only function of federal courts in certain types of suits under section 1983. *See, e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Even in the typical section 1983 case, however, where compensation and deterrence are the primary goals, the function

of upholding the societal efficacy of constitutional rights is an important aspect of the courts' congressionally assigned role of vindicating constitutional rights. Even the most effective administrative agencies are incapable of fulfilling this role since "the judiciary is clearly discernible as the primary means through which these (constitutional) rights may be enforced." *Davis* v. *Passman*, 442 U.S. 228, 241 (1979). To allow administrative agencies even temporarily to displace the federal judiciary as the vindicator of constitutional rights would be a significant departure from the judiciary's traditional role of maintaining the supremacy of the Constitutional against the contrary tendencies of the other branches of government. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

The role of the federal judiciary in our governmental system would thus be substantially diminished if, through the doctrine of exhaustion of administrative remedies, state agencies were to be treated as equally effective guarantors of the constitutional rights that those agencies have been accused of violating. Any such significant alteration of the role of the three branches of government in providing affirmative protection for constitutional rights should not be made in the absence of clear direction from Congress.

IV. Even If This Court Were To Create An Exhaustion Of Administrative Remedies Requirement For Certain Cases Brought Under Section 1983, Such A Requirement Would Be Inapproriate Here Because Of The Inadequacy Of The Illinois Prison Grievance Procedure.

A. PETITIONER SHOULD NOT BE REQUIRED TO EXHAUST THE ILLINOIS PRISON GRIEVANCE PROCEDURE SINCE SUCH PROCEDURE DOES NOT SATISFY CONGRESS'S MINIMUM STANDARDS FOR PROCEDURES THAT ARE SUBJECT TO AN EXHAUSTION REQUIREMENT.

Normally, the determination of whether administrative remedies are sufficiently adequate to require exhaustion can be made only through a case-by-case analysis of the nature of plaintiff's claim, the nature of the administrative remedies actually available and the purposes of Congress's statutory scheme. No such analysis is necessary here, however, since in section 7(b)(2) of Pub. L. No. 96-247, *see infra,* at 1a-2a, Congress has determined the minimum standards of adequancy that a prison grievance procedure must meet if exhaustion is to be required in a section 1983 suit. There was no evidence adduced below to show that the Illinois grievance procedure met the standards of the Act. Moreover, the regulations setting forth the Illinois grievance procedure, *see* J.A. 16-19, are facially inconsistent with all but one of the standards of the Act.

First, the regulations have no provision to meet section 7(b)(2)(A)'s requirement of "an advisory role for employees and inmates . . . (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system." Second, although sections II F and G of the Illinois regulations

provide for maximum time limits for responses to prisoner grievances by the Institutional Inquiry Board and by the Chief Administrative Officer of the Institution, J.A. 17, no time limits are set for responses at the level of the Director of Corrections and the Administrative Review Board. This omission contravenes Pub. L. No. 96-247's requirement of maximum time limits for replies "at each decision level within the system." Section 7(b)(2)(B).

Third, the Illinois grievance procedure includes no provision "for priority processing of grievances which are of an emergency nature," as required by section 7(b)(2)(C). Fourth, although the Illinois procedure in Section II P does prohibit "any disciplinary action" being taken against inmates for using the grievance procedure, J.A. 19, it does not provide assurance against other forms of retailiation. Pub. L. No. 96-247's requirement of "safeguards to avoid reprisals" in section 7(b)(2)(D) encompasses broader protection than merely preventing formal disciplinary action. The Proposed Regulations under the Act make this point explicit by defining "reprisal" as including "any action or threat of action" and requiring written assurance that participation in the grievance procedure will not result in "formal or informal reprisals." 45 Fed. Reg. 79,097 (1980) (to be codified in 40 C.F.R. §40.9).

Finally, section 7(b)(2)(E) provides "for independent review of the disposition of grievances . . . by a person or other entity not under the direct supervision or direct control of the institution." Whether the Illinois procedure, which provides for appeals of grievances to the Director of Corrections, is adequate to meet this standard will depend upon the Attorney General's clarification in his final Rules of the scope of the review intended.

Section 40.7(f) of the Proposed Rules indicates that the Illinois procedure is inadequate since that section requires that review be provided specifically for grievances relative to reprisals and "the substance or general application of policy." Regardless of what the final Rules of the Attorney General will specify, however, it is clear that the Illinois grievance procedure does not satisfy four of the five minimum standards Congress has required for prison grievance procedures that may be subject to an exhaustion requirement in section 1983 suits.

Public L. No. 96-247 also provides that if a court is to continue a prisoner section 1983 case for the purpose of exhausting administrative remedies it shall be "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." Section 7(a)(1). No evidence of any kind was introduced below concerning whether the Illinois grievance procedure was "effective." There is no indication that such procedure has ever resulted in the favorable resolution of even one prisoner grievance. Since Pub. L. No. 96-247 now requires some showing that the procedures required to be exhausted are "effective," a remand would be necessary in order to make such a determination. Moreover, since Pub. L. No. 96-247's effectiveness requirement is similar to the common law rule requiring exhaustion of only adequate administrative remedies, *see supra*, at 31-32, it was error for the District Court to dismiss Petitioner's complaint for failure to exhaust administrative remedies without any evidence or affording an opportunity to present evidence as to the adequacy of the Illinois grievance procedures. A remand for the determination of the effectiveness or adequacy of the Illinois procedures is not necessary, however, since, not only are such procedures inadequate as a matter of law in light of section 7(b)(2) A through (D), *see supra*, at

34-35, but they are also inadequate since they are deficient in the basic safeguards that are essential to provide meaningful administrative protection of prisoners' constitutional rights. *See* Part IV B *infra*.

B. BECAUSE THE ILLINOIS PRISON GRIEVANCE PROCEDURE IS INADEQUATE TO PROTECT PETITIONER'S CONSTITUTIONAL RIGHTS, IT WAS ERROR TO DISMISS PETITIONER'S COMPLAINT FOR FAILURE TO EXHAUST SUCH REMEDIES.

Petitioner has maintained that administrative remedies are inadequate to provide relief for claims assertable under section 1983 not only because of their inherent inability to provide legitimate societal vindication of constitutional rights but also because of their inability to provide practical protection for the exercise of such rights. *See* Part III C, *supra*, at 31-33. The Illinois prison grievance procedure provides a concrete, although perhaps extreme, example of an administrative remedial scheme that fails to provide even minimal practical protection for constitutional rights.[24]

The most serious deficiency of the Illinois grievance procedure is its failure to specify either its subject matter jurisdiction or the relief it makes available. The Illinois statute mandating a prison grievance procedure specifies the scope of its jurisdiction by stating only that the pro-

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[24] Although as noted *supra*, at 32-33, it is conceivable that administrative remedies might be formally constructed to mirror the protections afforded constitutional rights in the federal courts under section 1983, the Illinois procedures are not aberrant in their failure to afford minimally adequate protection for prisoners' constitutional rights. *See* Comment, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdication and the Availability of Adequate State Remedies,* 7 Seton Hall L. Rev. 366, 403-09 (1976).

cedure shall be established "to review the grievances of committed persons." Ill. Rev. Stat. ch. 38, §1003-8-8(a) (1979), *infra*, at 3a. The Illinois Department of Corrections Regulation implementing the grievance procedure does not further clarify its jurisdiction in stating that its purpose is to "air and seek resolution to complaints, problems and grievances. . . ." Illinois Department of Corrections Administrative Regulation 845 §I, (J.A. 18) (hereinafter referred to as A.R. 845).

Furthermore, neither the Statute nor the Regulation specify any remedy. The Statute speaks only of the "review of grievances," Ill. Rev. Stat. ch. 38, §1103-8-8 (a) (1979), and the Regulation refers only to "action" by the Chief Administrative Officer and a "final determination" of the grievance appeal by the Director of Corrections. A.R. 845 II(G), (N), (J.A. 17-18). Most important, the Statute and Regulation do not authorize the resolution of grievances through an award of damages to the grievants. A proceeding in the Illinois Court of Claims is the only mechanism the State of Illinois makes available for the award of damages from state funds. Ill. Rev. Stat. ch. 127, §801 (1979); Ill. Rev. Stat. ch. 37, §§439.1 *et seq.* (1979).[25] In the absence of a damage remedy the Illinois grievance procedure can obviously not fulfill either the compensatory or the deterrent func-

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[25] In recommending that Petitioner file in the Court of Claims, rather than pursue the appellate administrative grievance procedure, the Institutional Inquiry Board impliedly recognized the inadequacy of the Illinois grievance procedure where, as in Petitioner's case, redress other than simple return of missing property would be necessary should the claim prove meritorious. Report of Institutional Inquiry Board (J.A. 12). *See* Part IV C *infra*, at 43, for discussion of inadequacy of the Illinois Court of Claims remedy in Petitioner's case.

tions of section 1983.[26] *See Owen* v. *City of Independence*, 445 U.S. at 651.

Even if damages were authorized under the Illinois grievance procedure, that procedure gives no reason to believe prison officials could award damages or any other form of relief for deprivations of constitutional rights. The Seventh Circuit in *Secret* v. *Brierton*, 584 F.2d 823 (7th Cir. 1978), *supra*, at 11, did not address the procedure's lack of remedy for constitutional harms apparently because of its assumption that the plaintiff could receive adequate redress for his claim of an unconstitutional deprivation of property since all he really desired was the repair of his damaged radio. *Id.* at 828-29. Regardless of whether the Seventh Circuit correctly perceived the intentions of the plaintiff in *Secret*, it incorrectly assumed that administrative remedies based on common law principles of restitution are "fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." *Monroe* v. *Pape*, 365 U.S. at 196 n.5 (1961) (Harlan, J., concurring). The harms incident to violations of due process of law, like the harms incident to rights under the first amendment, fourth amendment and equal protection clause, are not necessarily coextensive with any consequent detriment to property interests. For example, as this Court recognized in *Carey* v. *Piphus*, 435 U.S. at 262, a due process violation may result in emotional distress that is compensable apart from any damage to property interests. The inadequacy of the remedy envisioned in *Secret* is especially clear in

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[26] Moreover, as this Court recognized in *Carlson* v. *Green* 100 S. Ct. at 1475, even if an award of damages from state funds were authorized, the deterrent purposes of section 1983 would not be as effectively served as if damages were recoverable against officials individually.

the Petitioner's case since the relief requested in his federal court complaint includes not only reimbursement of $600.00 for the personal property taken from him, but also an award of $10,000 for damages suffered because of the illegal taking of his personal property. Complaint, at 4 (J.A. 5).

Moreover, the Seventh Circuit opinion in *Secret* makes explicit the impropriety of applying an exhaustion requirement in the context of Petitioner's case. The Seventh Circuit in *Secret* limits its exhaustion requirement to cases where the alleged deprivation without due process is of property "of no great monetary value" and where no liberty interest is involved, thereby excluding from the requirement cases where the deprivation of "legal materials" is alleged. *Id.* at 829. The Seventh Circuit's attempt to carve out an exception to its no-exhaustion rule for small property claims is unsupportable as a matter of law and policy.[27] It leaves no doubt,

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[27] In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), this Court explicitly rejected any distinction in the protection afforded by the due process clause to liberty and property claims:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a saving account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Id. at 552. Moreover, in creating what is in effect a jurisdictional requirement of an amount in controversy for section 1983 claims, the Seventh Circuit has invaded the province of the legislature and contradicted its judgment, expressed in 28 U.S.C. 1343(3), that no amount in controversy is a prerequisite to filing in federal court under section 1983. The Seventh Circuit's small claims exception to the no exhaustion rule is also highly uncertain in its application and unfair to the less affluent, especially those who are incarcerated.

however, that an administrative remedy is inappropriate to redress Petitioner's claim of a deprivation of property without due process of law, for the property Petitioner claimed was unconstitutionally taken was alleged to be worth $600.00 and to have included legal materials. Affidavit of Property Missing (J.A. 9-10).[28]

Personal possessions worth $600 are likely to be valued by a prisoner "disproportionately to their price on the open market." *Bonner* v. *Coughlin*, 517 F.2d 1311, 1314 (7th Cir. 1975) (opinion of Stevens, J.), *modified en banc* 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). *See Weddle* v. *Director, Patuxent Institution*, 405 U.S. 1036 (1972), *vacating* 436 F.2d 342 (4th Cir. 1970) (vacating dismissal of prisoner 1983 suit involving property having aggregate value of $3.52).

[28] Petitioner's *pro se* pleadings do not disclose whether the deprivation of his "legal materials" caused any interference with his ability to conduct ongoing legal proceedings. Petitioner's *pro se* petition for certiorari states that such materials included law books, two transcripts, numerous motions, a post conviction petition, legal correspondence and legal materials that his mother was to have taken to counsel. Petition for Cert., at 5-7. In the absence of any opportunity afforded by the District Court for Petitioner to prove the significance of the deprivation of his "legal materials," it was error to dismiss his *pro se* complaint for failure to exhaust administrative remedies since such remedies are clearly inappropriate to redress a claim of denial of access to court. See *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969); *see also Hughes* v. *Rowe*, 49 U.S.L.W. 3346, 3347-78 (November 11, 1980) (per curiam) (prisoner's *pro se* complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 3347); *Bonner* v. *Coughlin*, 517 F.2d at 1321 n.29 (although "as a theoretical matter" prisoner could have filed necessary documents without transcripts, he "has a right to try to prove that the transcript disappearance sufficiently interferred with his effective exercise of his rights under Illinois law to give rise to a damage recovery.") In addition, the deprivation of Petitioner's property, which included legal and personal correspondence, implicated Petitioner's rights under the first amendment. *See Procunier* v. *Martinez* 416 U.S. 396, 408 (1973). Claims of deprivation of first amendment rights are similarly an inappropriate subject for an exhaustion of administrative remedies requirement since adequate redress can only be expected from the courts.

The Illinois grievance procedure also fails to provide adequate protection for constitutional rights because it does not afford grievants a meaningful hearing. The Regulation does not require that a grievant be given an opportunity to present evidence in addition to that of his own testimony or that he be given an opportunity to cross-examine witnesses. A.R. 845, II (E). (J.A. 17). Petitioner does not maintain that a prison grievance procedure need have all of the procedural protections of a court of law. However, because the ability to present witnesses in one's favor and to cross-examine adverse witnesses are essential elements of a fair and accurate fact-finding hearing, adequate protection for constitutional rights cannot be afforded in an administrative hearing without these safeguards. Although such safeguards are not always required in prison disciplinary proceedings, *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974), their requirement is justified here because the interest at stake, the adequate protection of constitutional rights, is of far greater legal significance.

Finally, the Illinois grievance procedure is inadequate to protect constitutional rights because the Institutional Inquiry Board, which hears the grievant's evidence, has no decision-making authority. It merely makes a recommendation to the prison's Chief Administrative Officer, who has decision-making authority, but no duty to hear any evidence. A.R. 845, II (F)(G) (J.A. 17). The administrative appeal procedure provides even more tenuous protection to grievants. The Administrative Review Board, which is convened only when the Director of Corrections feels an appeal has merit or should be investigated further, need not hear any evidence from the grievant or call any witnesses. Furthermore, it can only make findings and recommendations

for the consideration of the Director, who also need hear no evidence. A.R. 845, II (J), (L), (M), (N) (J.A. 18). As this Court noted in *McNeese* v. *Board of Education*, 373 U.S. at 675, a critical element of what would be an adequate administrative remedy, if such were possible under section 1983, is the ability of the hearing body to order corrective action. At no level of the Illinois prison grievance procedure does the body hearing evidence have that ability.

In sum, even if under certain circumstances administrative remedies were required to be exhausted under section 1983, it was error to dismiss Petitioner's Complaint for failure to exhaust the remedies provided by the Illinois prison grievance procedure because those remedies cannot provide adequate redress for Petitioner's constitutional claims. The Illinois procedure does not provide for an award of damages, does not provide redress for any constitutional violations and does not provide the basic elements of a fair hearing.

C. SINCE PURSUIT OF THE ADMINISTRATIVE REMEDIES REMAINING OPEN TO PETITIONER WOULD HAVE BEEN FUTILE, THE DISMISSAL OF HIS COMPLAINT FOR FAILURE TO EXHAUST SUCH REMEDIES WAS ERROR.

The exhaustion of administrative remedies doctrine does not apply where pursuit of such remedies would be futile. *Montana National Bank of Billings* v. *Yellowstone County of Montana*, 276 U.S. 499, 505 (1928). It also does not apply where the plaintiff cannot intelligently select the proper alternative state remedy and may therefore end up with no appropriate remedy whatever. *Wilwording* v. *Swenson*, 404 U.S. at 250. The Report of the Institutional Inquiry Board (J.A. 12) both left Petitioner with no reasonable doubt as to the futility of fur-

ther administrative appeal and directed him to an alternative remedy that would have been futile. Petitioner thereby found himself on an "Illinois merry-go-round" similar in operation to that decried by Justice Rutledge concurring in *Marino* v. *Ragen*, 332 U.S. 561, 570 (1947).

The District Court dismissed Petitioner's complaint because he failed to appeal to the Institutional Inquiry Board's denial of his grievance to the Director of the Department of Corrections. (J.A., 25-26). The Board, however, had made the recommendation that because Petitioner's claim of missing personal property could not be verified, the Petitioner may file in the Court of Claims. (J.A. 12). It was thus Petitioner's apparent reliance on the grievance system's own representation of the futility of further pursuit of the grievance process that resulted in Petitioner's failure to take the procedural steps later found necessary by the District Court. Moreover, even if Petitioner had been able to discover the jurisdictional and procedural prerequisities of filing in the Illinois Court of Claims, it would have been clear that such remedy offers no possibility of redress for constitutional violations by agencies of the State and is therefore irrelevant to his claim. Illinois Rev. Stat. ch. 37, §439.8(d) (1979), authorizes "claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit. . . ." Since, as Petitioner made clear in his amended complaint (J.A. 5) his claim is for damages for violation of his right to due process of law and equal protection of the laws, the state action prerequisite of such claim would preclude "a like cause of action . . . against a private person or corporation. . . ." thereby rendering exhaustion of the Court of Claims procedure futile.

Moreover, it is an established rule of the Illinois Court of Claims that "where the claimant has an adequate remedy in a court of general jurisdiction, the Court of Claims has no jurisdiction." *Rockford Memorial Hospital Assoc.* v. *Illinois*, 26 Ill. Ct. Cl. 215, 218 (1968). Since Illinois courts will entertain a claim for violation of constitutional rights under 42 U.S.C. 1983, *Bohacs* v. *Reid*, 63 Ill. App. 3d 477, 481-82, 379 N.E.2d 1372, 1375-76 (1978); *see also Martinez* v. *California* 444 U.S. 277, 283, n.7 (1980), the Illinois Court of Claims would deny Petitioner a remedy for his constitutional claim on this ground as well.

Perhaps if Petitioner had the advice of an attorney he would have ignored the Institutional Inquiry Board's finding that his remedy lay in the Court of Claims and instead, in spite of the absence of the requisite documentary evidence, he would have appealed to the Director of the Department of Corrections. To require this course of action of a layman, however, would be unrealistic and contrary to the pragmatic criteria that have characterized application of the exhaustion doctrine.

In sum, Petitioner has maintained that under no circumstances can exhaustion of the Illinois prison grievance procedures be required as a prerequisite to filing suit under section 1983. However, should this Court find to the contrary, then exhaustion could still not be required under the specific circumstances of this case unless the doctrine were to be used as a rote mechanism for denying or delaying access to federal court. Use of the doctrine for this end would be a serious distortion of its valid purposes.

V. The District Court Committed Additional Error In Dismissing Petitioner's Complaint Without Consideration Of The Facts Alleged In Petitioner's Proposed Amended Complaint.

In his proposed amended complaint filed August 16, 1979, Petitioner alleged that four named prison officials, including the Director of the Illinois Department of Corrections, and various unnamed prison officials conspired to deprive Petitioner of his personal property in violation of his rights to due process of law and equal protection of the laws.[29] Motion for Leave to Amend and Supplement Plaintiff's Original Complaint, (J.A. 20-23). In dismissing Plaintiff's complaint for failure to exhaust administrative remedies on October 24, 1979, the District Court effectively denied Plaintiff's motion for leave to amend without giving any justifying reason. In *Foman* v. *Davis*, 371 U.S. 178 (1962), this Court stated:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182.

Nevertheless, despite the absence of any declared reason for the denial of Petitioner's motion for leave to amend, such denial would probably not be deemed prejudicial error if the Record revealed good cause for denial, which, according to *Foman* would include reasons "such as undue delay, bad faith or dilatory

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[29] Petitioner's original complaint had named only Warden Brewer as the official responsible for the allegedly illegal deprivation of his property.

motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment. . . ." *Id.* No such reasons appear from the record in this case. Moreover, the new allegations in the motion for leave to amend provide added reason why Petitioner's failure to exhaust prison grievance procedure is an inappropriate ground for dismissal of Petitioner's case.

Exhaustion of administrative remedies will not be required if the claimant cannot reasonably expect that the administrative decision-maker will give the claim impartial consideration. *See Moore* v. *City of East Cleveland*, 431 U.S. 494, 529 n.4 (1977) (Burger, C.J., dissenting); *Gibson* v. *Berryhill*, 411 U.S. at 575 n.14. Where the basis of the claimed deprivation is that the individuals who will decide the claim intentionally caused that deprivation, the decision-making process obviously cannot be deemed impartial. This is exactly the circumstance in Petitioner's case, for one of the alleged co-conspirators, Lou Brewer, the Warden of Stateville prison, had final decision-making authority with respect to Petitioner's grievance at the initial hearing level, A.R. 845, II (G) (J.A. 17), and another alleged co-conspirator, Gale Franzen, Director of the Illinois Department of Corrections, had final decision-making authority at the appellate level. *Id.* at II (I) and (N), (J.A. 18).

In sum, Petitioner has maintained in the preceding arguments that the dismissal of his original complaint for failure to exhaust administrative remedies was clearly erroneous since his complaint alleged the deprivation of constitutional rights pursuant to section 1983. The additional allegations in his motion for leave to amend his

complaint provide further reason to reverse the dismissal for failure to exhaust because they demonstrate that such exhaustion would be futile in the context of biased decision-makers. Moreover, because the District Court's failure to allow the requested amendment to the pleadings appears to have no justification in the Record and is therefore contrary to this Court's construction of the purposes of Fed. R. Civ. P. 15(a), the Court of Appeals' affirmance of the District Court's dismissal should be reversed and the case remanded with directions to allow Petitioner to file the requested amended complaint.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the decision below of the United States Court of Appeals for the Seventh Circuit, affirming the dismissal of Petitioner's Complaint, be vacated with directions that the case be remanded to the District Court for further proceedings consistent with Pub. L. No. 96-247. In the alternative, Petitioner requests that the Seventh Circuit's decision below be reversed with directions that the case be remanded to the District Court for reinstatement of Petitioner's Complaint and further proceedings pursuant thereto. In addition, Petitioner requests that the case be remanded with directions that the District Court grant Petitioner's previously filed Motion For Leave To Amend and Supplement Plaintiff's Original Complaint.

Respectfully Submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

Section 1983 of Title 42 of the United States Code:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980), Section 7. EXHAUSTION OF REMEDIES:

> (a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).
>
> (b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum

standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide —

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this act.

Illinois Unified Code of Corrections, 3-88; Illinois Rev. Stat. ch. 38, §1003-8-8 (1979).

§3-8-8. Grievances. (a) The Director shall establish procedures to review the grievances of committed persons. The Director may establish one or more administrative review boards within the Department to review grievances. A committed person's right to file grievances shall not be restricted. Such procedure shall provide for the review of grievances by a person or persons other than the person or persons directly responsible for the conditions or action against which the grievance is made.

(b) Such procedures shall provide that a record of such grievance and any decision made with respect to it shall be preserved for a period of one year.

(c) Such proceduces shall allow committed persons to communicate grievances directly to the Director or some person designated by the Director outside of the institution or facility where the person is confined.

(d) All committed persons shall be informed of the grievance procedures established by the Department and they shall be available to all committed persons.

(e) Discipline shall not be imposed because of use of the grievance procedure.